Knogo Corporation *and* Local 810, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 29-CA-8378, 29-CA-8420, 29-CA-8471, 29-CA-8508, and 29-CA-8508-2

December 14, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 1, 1981, Administrative Law Judge Winifred D. Morio issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found that Respondent violated Section 8(a)(1) of the Act by disparately applying its no-solicitation rule, and that, in disparately applying that rule, violated Section 8(a)(3) and (1) of the Act by issuing written and oral warning notices to employees Ira Klein, William Layton, and Stephanie Mariotti, and Section 8(a)(1) by warning Laura Bitterfield. The Administrative Law Judge further found that Respondent violated Section 8(a)(1) of the Act by circulating an antiunion petition through its agent, Iris Gonzalez.[1] We agree that Respondent violated Section 8(a)(3) and (1) of the Act by disciplining employees Layton and Klein, but do so for the reasons stated below. In all other respects mentioned above, we shall dismiss the complaint.[2]

I. THE ANTIUNION PETITION AND THE STATUS OF IRIS GONZALEZ

The Administrative Law Judge found that employee Iris Gonzalez was Respondent's agent, and that, by Gonzalez' circulation of an antiunion petition, Respondent violated Section 8(a)(1) of the Act. For the following reasons, we disagree.

The record shows that Gonzalez is a lead person working under the supervision of Plant Manager Anthony Rizzi. Gonzalez possesses none of the traditional indicia of supervisory authority. She voted without challenge in the prior Board representation election, receives essentially the same fringe benefits as Respondent's production employees, and, like those employees, punches a timeclock. Gonzalez' duties include checking the work of other employees and monitoring production.[3] When not so engaged, Gonzalez performs actual production work.

Gonzalez' responsibilities also include reporting to Rizzi any rule infractions or repeated incidents of poor performance by other employees. However, any discipline for such conduct is administered by Rizzi only after his independent investigation and evaluation. Similarly, when production needs warrant, Gonzalez will recommend to Rizzi that certain employees be transferred from one type of work to another. It is Rizzi, however, who decides to make such reassignments, and who authorizes Gonzalez to relay his instructions to the affected employees.

In October 1980, Gonzalez circulated an antiunion petition among Respondent's employees. The record is unclear as to how many days it was in circulation. What is clear, however, is Respondent's action upon learning of Gonzalez' solicitation of signatures. On October 22, 1980, Supervisor Richard Leicht observed Gonzalez, during working time, holding a piece of paper and talking to employee Stephanie Mariotti. Leicht testified that he then told Rizzi that Gonzalez was trying to get signatures. Rizzi immediately called Gonzalez into his office and reprimanded her. He told Gonzalez that she could not campaign either for or against the Union on working time, but must restrict such activities to before or after work, at lunchtime, or on breaks. He cautioned her that, if she continued, he would take further disciplinary action. This reprimand was documented and became a part of the general personnel file maintained by Rizzi.

The Administrative Law Judge found that, although Gonzalez was not a supervisor, she was Respondent's agent. She found that Gonzalez relayed information from management to employees and had been placed by management in such a position that employees could reasonably believe she spoke for management when she circulated the antiunion petition. We disagree.

Gonzalez' alleged function as a "conduit of information" from management to the employees is in-

[1] We note that no exceptions were filed to the Administrative Law Judge's dismissal of the balance of the complaint allegations.

[2] The Administrative Law Judge also found that Respondent violated Sec. 8(a)(5) of the Act by making unilateral changes in wage rates, hours, and paid holidays, and by laying off and recalling employees, following the Administrative Law Judge's issuance of a bargaining order in Cases 29-CA-6502, 29-CA-6522, 29-CA-7081, 29-CA-7207, 29-CA-7360, and 29-RC-4562, affirmed by the Board at 262 NLRB 1346 (1982). We find in addition that Respondent violated Sec. 8(a)(1) of the Act by making these unilateral changes.

[3] The record does not indicate the percentage of time Gonzalez spends on these duties.

sufficient to warrant vicarious liability of Respondent for her circulation of the petition. Gonzalez' transmittal of working orders from Rizzi to the employees is of a purely routine nature. We find it indicates no more than that Gonzalez is an experienced employee entrusted with nonsupervisory lead authority. See *Meyer Jewelry Company, Inc.*, 230 NLRB 944 (1977).

We also do not find evidence to support the Administrative Law Judge's finding that Gonzalez was in a position where employees would view her as speaking for management. Unlike those employees found to be agents in the cases relied on by the Administrative Law Judge, there is no evidence that Gonzalez attended management meetings or directed employee meetings on behalf of management. Cf. *B-P Custom Building Products, Inc.; and Thomas R. Peck Mfg.*, 251 NLRB 1337 (1980). Gonzalez did not have the authority to hire, fire, or discipline employees. Cf. *Han-Dee Pak, Inc.*, 249 NLRB 725 (1980). The record does not indicate that Gonzalez arranged the employees' work schedules. Her direction of production work was found to be of a routine nature, with the evidence failing to show the exercise of independent judgment. Cf. *Broyhill Company*, 210 NLRB 288 (1974). In refusing to find that Gonzalez appeared to be acting on behalf of management when she circulated the petition, we deem significant Respondent's response to her solicitation. By putting an immediate halt to Gonzalez' worktime campaigning, and by reprimanding her for that activity, Respondent showed it was neither acquiescing in nor condoning the petition. We therefore find that Gonzalez was not Respondent's agent, and that Respondent has not violated Section 8(a)(1) of the Act by Gonzalez' circulation of an antiunion petition.

II. THE WARNING NOTICES TO WILLIAM LAYTON AND IRA KLEIN: THE OCTOBER 14 INCIDENT

On October 14, 1980, employee Ira Klein prepared a sign reading "Vote Union," and he and employee William Layton, at various times, posted the sign in the production area. Employee Donna Pizzo threw the sign in a wastebasket. An argument erupted between Pizzo and Klein, causing other employees to stop working.

Supervisor Rizzi was called to the building by employee Gonzalez. After directing the other employees to return to work, Rizzi took Gonzalez, Klein, and Pizzo into a nearby closet. Klein and Pizzo continued to argue their union views, with Pizzo complaining to Rizzi that Klein had tried to persuade her to join the Union. Rizzi reprimanded Pizzo and Klein for disrupting production, and warned that further disturbances would result in disciplinary action against both employees.

Rizzi reported the incident to Respondent's vice president, Michael Trentacosti. At Trentacosti's direction, Rizzi prepared and issued written warning notices to Klein and Layton. Pizzo was not given any written warning because, Rizzi testified, she had remained working at her machine while Klein argued with her.

The Administrative Law Judge found that Rizzi viewed Pizzo and Klein as equally responsible for the disruption of production, and that Rizzi's own testimony placed Pizzo in the "thick of the argument." The Administrative Law Judge concluded that, by disparately disciplining these employees, Respondent discriminatorily applied its no-solicitation rule in violation of Section 8(a)(3) and (1) of the Act.

We adopt the Administrative Law Judge's conclusion that Respondent violated Section 8(a)(3) and (1) of the Act by issuing written reprimands to prounion employees Klein and Layton while failing to issue such a warning to antiunion employee Pizzo. In doing so, however, we find it unnecessary to pass or rely on the Administrative Law Judge's finding that these reprimands resulted from Respondent's disparate application of a no solicitation rule.[4] Rather, based on the timing of Respondent's action, taken in response to an incident where the employees were heatedly discussing their union views, Respondent's knowledge of the employees' views, and the pretextual character of Respondent's defense, it is plain that the harsher discipline given to Layton and Klein was based on their union activities. For the reason above, we find that Respondent violated the Act.[5]

III. THE WARNINGS TO LAURIE BITTERFIELD AND STEPHANIE MARIOTTI

Laurie Bitterfield was employed by Respondent as an assembler on the night shift. On October 16 she attended a union meeting where the possibility of a strike was discussed. That evening at work, she approached working employees and asked for their telephone numbers, to be used in the event of

[4] During the course of the hearing, the parties stipulated that Respondent's employee handbook contains the following statement: "The solicitation of any kind is prohibited on working time." We note that the complaint does not allege that Respondent has promulgated and/or enforced an invalid no-solicitation rule. The issue of the rule's validity was not fully litigated, and we do not pass on that question. Similarly, the issues of whether the employees knew of the rule's existance and what constituted working, as opposed to break, time were not fully litigated, and we likewise do not pass on them.

[5] We shall include as part of our remedy the requirement that Respondent expunge from its records any reference to the unlawful discipline, and provide written notice to the discriminatees that Respondent's unlawful conduct will not be used as a basis for further personnel actions against them. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

a strike. It is unclear whether Bitterfield was on break while so soliciting.

Irving Peckler, Bitterfield's supervisor, was approached by other employees who questioned him about the strike and told him of Bitterfield's taking telephone numbers. He approached Bitterfield, and told her she could not conduct union business on work and/or company time. Bitterfield responded that she was on break, to which Peckler relied that the employees to whom she spoke were working. According to the credited testimony, Peckler did not threaten Bitterfield with further disciplinary action. The warning was not documented in any way.

Stephanie Mariotti is employed by Respondent, performing various duties under the supervision of Richard Leicht. On October 17, 1980, Leicht reprimanded Mariotti for soliciting for the Union during working hours. Based on other employee complaints, Leicht accused Mariotti of soliciting card signatures in the ladies' room while on working time. Leicht verbally reprimanded Mariotti for this activity, and documented the reprimand for his personnel file.

The Administrative Law Judge found that the above two incidents were examples of Respondent's disparate application of its no-solicitation rule. She based this in part on her finding that Respondent had not applied its rule against antiunion employee Pizzo in the October 14 incident. We disagree.

As noted above, the disparate application of the no-solicitation rule is not an issue in the October 14 incident. Furthermore, an examination of the disciplinary action taken against Bitterfield, Mariotti, and Iris Gonzalez demonstrates that Respondent applied its restrictions to all employees. Upon learning of their worktime activities, Respondent put a stop to the antiunion campaigning of Gonzalez and the prounion campaigning of Bitterfield and Mariotti. All employees were advised that campaigning had to be restricted to before or after work, at lunch, or during breaks. We therefore dismiss these allegations.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Knogo Corporation, Hicksville, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Reprimanding and/or issuing warning notices for disruption of production to employees who favor the Union while failing to so reprimand employees who oppose the Union.

(b) Unilaterally changing terms and conditions of employment without notice to the Union and without affording it an opportunity to negotiate and bargain about such changes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Rescind the disciplinary warnings given to Ira Klein and William Layton on October 14, 1980, expunge from all personnel and other records all references to said warnings, and notify Ira Klein and William Layton, in writing, that this has been done and that evidence of this unlawful discipline will not be used as a basis for future personnel actions against them.

(b) Notify and, upon request, bargain with the Union concerning any changes in terms and conditions of employment.

(c) Post at its Hicksville, New York, plant copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that all allegations contained in the consolidated amended complaint not found to constitute unfair labor practices herein be, and they hereby are, dismissed.

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we

have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT reprimand and/or issue warning notices for disruption of production to employees who favor the Union while failing to so reprimand employees who oppose the Union.

WE WILL NOT unilaterally change terms and conditions of employment without notice to the Union and without having afforded it an opportunity to negotiate and bargain about such changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by the Act.

WE WILL rescind the disciplinary warnings given to Ira Klein and William Layton on October 14, 1980; WE WILL expunge from all personnel and other records all references to said warnings; and WE WILL notify Ira Klein and William Layton, in writing, that such action has been taken and that evidence of this unlawful discipline will not be used as a basis for future personnel actions against them.

WE WILL notify and, upon request, bargain with the Union concerning any changes in terms and conditions of employment.

KNOGO CORPORATION

DECISION

STATEMENT OF THE CASE

WINIFRED D. MORIO, Administrative Law Judge: This case was heard before me on March 2 and 3, 1981, at Brooklyn, New York, and on March 4–6 and 9–11, 1981, at New York, New York, pursuant to a consolidated amended complaint issued by the Regional Director, for Region 29 on February 23, 1981. The consolidated amended complaint was based on charges filed in the above-captioned cases by Local 810, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein the Union), against Knogo Corporation (herein Respondent), on October 14 and 29, November 26, and December 14 and 16, 1980, respectively. In addition a first amended charge was filed in Case 29-CA-8508 on December 31, 1980, and a first amended charge was filed in Case 29-CA-8508-2 on January 12, 1981. In substance the consolidated amended complaint alleges that Respondent, by its supervisors and agents, violated Section 8(a)(1), (3), and (5) of the Act by engaging in acts of interrogation, warnings, threats, surveillance, reprimands, disparate treatment, reduction in overtime, assignment to more arduous work, demotion and reduction in pay, unilateral changes in work conditions, and circulation of a petition and inducement of employees to sign said petition disavowing support for the Union. Respondent, in its answer, denies the commission of the alleged unfair labor practices.

All parties were given full opportunity to participate in the proceeding, to introduce relevant evidence, to cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed on behalf of Respondent.

Upon the entire record in this case, and my observation of the demeanor of the witnesses, and after careful consideration I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, has maintained, at all times material herein, its principal office and place of business at 98 and 100 Tec Street, Hicksville, New York, where it is and has been engaged in the manufacture, sale, and distribution of electronic shoplifting devices and related products. Respondent annually, in the course and conduct of its operations, purchases and has delivered to its place of business goods and materials valued in excess of $50,000 of which goods and material valued in excess of $50,000 are delivered to its place of business in interstate commerce directly from States of the United States other than the State in which it is located. The parties admit and I find that Respondent is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties admit and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. BACKGROUND

On September 18, 1980, Administrative Law Judge Robert M. Schwarzbart issued a decision in Cases 29-CA-6502, 29-CA-6522, 29-CA-7081, 29-CA-7360, and 29-RC-4562 wherein he found that Respondent had violated the Act by the following conduct: discharging an employee because of his activities on behalf of the Union, interrogating employees, creating an impression of and engaging in surveillance, enforcing, in a disparate manner, certain rules, granting new economic benefits to employees during the Union's organizing campaign, attributing its inability to grant benefits to the presence of the Union, and coercively singling out employees who were known union adherents to meet with management representatives in an area of managerial authority. In ad-

dition Administrative Law Judge Schwarzbart recommended that an election held in Case 29-RC-4562 be set aside and that Respondent be ordered to recognize and bargain with the Union as the bargaining representative of certain of Respondent's employees. Respondent has filed exceptions to this decision. The matter is pending before the Board.

IV. THE ALLEGED UNFAIR LABOR PRACTICES, FACTS, CONTENTIONS, AND CONCLUSIONS

The conduct involved herein alleged to be violative of the Act occurred between August and December 1980. Therefore all dates unless otherwise noted will refer to 1980.

A. *The Dodge-Famighetti Incident*

The complaint alleges that a conversation between Lyle Dodge, an employee, and Louis Famighetti constituted an interrogation violative of the Act. Respondent denied the interrogation.[1]

According to the testimony of Lyle Dodge, a production wireman employed since August 1979, it was his custom to eat his lunch in his car in the company parking lot and thereafter, weather permitting, to walk around the area. On August 29 while in the parking lot he was called by Louis Famighetti, manager of production, planning, and control, to his car. Famighetti also apparently ate lunch in his car. Dodge was not under Famighetti's supervision and the record fails to disclose that the two individuals were more than acquaintances. According to Dodge, Famighetti began the conversation by stating that, although he preferred not to become involved in the union situation, it was part of his job and he was "supposed" to ask questions. Famighetti then questioned Dodge about whether he had attended a union meeting, what occurred at the meeting, who asked the most questions, and were Hispanic employees present at the meeting. Dodge claims that he told Famighetti that he had attended the meeting, some Spanish employees were present, although he did not know their names and the employees discussed the usual union matters. According to Famighetti he had two conversations with Dodge in the summer of 1980. The first conversation, which occurred about mid-July in the parking lot, was brief and the only matters discussed were boating and the pleasant weather. The second conversation also took place in the parking lot about 3 weeks later and the topic on this occasion concerned their individual hobbies of guitar playing and boating.

The Board has held that interrogations, by a supervisor, concerning union meetings without assurances that there will be no reprisals is coercive.[2] Also an interrogation as to the identity of the persons who made statements at the meeting has been held to be violative of the Act.[3] Accordingly, if the conversation occurred as alleged there would be a violation of the Act. However, in resolving credibility in these "one on one" situations consideration must be given to the plausibility and implausibility of the alleged conversation. Famighetti specifically denied that the conversation occurred as alleged, although he did admit that he had two conversations with Dodge about general matters. A conversation concerning general matters would appear to be more consistent with the admitted relationship existing between the parties. As noted, Famighetti was not Dodge's supervisor and the record fails to establish that the two were more than mere acquaintances. Further, although Dodge may have been a union supporter at the time of the alleged conversation this record fails to disclose either that fact or the fact that Famighetti had any knowledge concerning Dodge's union activities. In addition, and of significance, is the timing of the alleged interrogation. The evidence submitted fails to explain why at this particular time, August 29, Famighetti was seeking information about union meetings. The hearing in the original case closed in December 1979 and the decision by the Administrative Law Judge did not issue until September 18, 1980. The parties could not have known on August 29 that the decision was to issue in September. Insofar as this record discloses it does not appear that anything unusual took place between the close of the hearing in December 1979 and the time of the alleged interrogation in August 1980. The union agents had been present at Respondent's premises since organizing began in 1978. The existence of the Union was well known as was the fact that the Union held meetings. There is no evidence in this record to show that the Union had abandoned the holding of meetings or had started holding them anew nor does the record show that Famighetti was aware of any such activity. In sum the record fails to establish why at this particular time Famighetti would engage in the alleged conduct. Finally, as will be noted in a subsequent incident concerning another employee, William Layton, Dodge's recollection of events is not always accurate. Accordingly, I do not credit that the conversation occurred as alleged and I conclude that this allegation is not sustained.

B. *The Dodge-Payne Incident*

The complaint alleges that a conversation between Lyle Dodge and George Payne, a supervisor, constituted an interrogation. Respondent denied that an interrogation occurred.

Lyle Dodge testified that on or about October 13 or 14, while in the men's room at Respondent's facility, he had a conversation with George Payne, the stockroom foreman. Payne, according to Dodge, asked whether there was going to be a strike. Dodge replied that it was possible and then commented that if one occurred it would be because of the decision which had issued granting a bargaining order. Payne made a derogatory remark about the Administrative Law Judge who had issued the decision at which point Dodge decided to leave. Payne had no recollection of such a conversation, although he did recall speaking to Dodge occasionally about baseball, music, etc. Payne claimed that he had

[1] The answer admits the supervisory status of Louis Famighetti, George Payne, Richard Leicht, Anthony Rizzi, Mike Trentacosti, and Irving Peckler.

[2] *Excavation-Construction, Inc.*, 248 NLRB 649, 651 (1980).

[3] *Smyth Manufacturing Company, Inc., Beacon Industries*, 247 NLRB 1139, 1171 (1980).

heard about the possibility of a strike as a result of a meeting held by the president of the Company. Payne was not Dodge's supervisor and the two were not personal friends. In fact Dodge testified that he did not know Payne's correct name until the investigation of the instant case. In addition the record fails to establish that Payne knew Dodge was a union adherent and was therefore a person who could give more exact information about the possibility of a strike. Considering all the circumstances I do not credit that the conversation took place as alleged. However, assuming, *arguendo*, that the conversation occurred as Dodge testified, I would not find such a statement to be coercive absent any claim that the inquiry was coupled with a statement that disciplinary action would follow.[4] Accordingly, I conclude that this allegation is not sustained.

C. *Profsky-Peckler Incident*

The complaint alleges that a conversation between Irving Peckler, a supervisor, and Richard Profsky, an employee, held at some point in mid-October constituted interrogation. Respondent denied this allegation.

Richard Profsky, employed as a porter between June and December, testified that he was advised in about mid-October by Peckler to attend a meeting at which the president of the Company was scheduled to speak. Profsky asked Peckler whether the speech would concern union matters and stated that if it did he had a legal right not to attend. Profsky apparently was not required to attend but he claimed that Peckler did question him as to what he would do in the event of a strike. Profsky replied that he would join any legal job action. Peckler also, according to Profsky, asked whether Profsky would throw rocks at his car to which Profsky responded that he would not and the conversation ended. Peckler's recollection of any conversation with Profsky was unclear but he did testify that it was Profsky who volunteered the information that he would join the strike if one were called. Peckler also recalled that at some point Profsky stated that he was a nonviolent person but he did not recall the circumstances of this conversation.

Assuming that the conversation occurred as alleged I do not find such an interrogation in the circumstances existing herein to be a violation of the Act. The Board has stated that questions about employee strike intentions are not *per se* unlawful but must be judged in light of all relevant circumstances. These circumstances include whether the employer had a reasonable basis to fear that a strike would occur, whether the inquiry related to a desire to continue operations, and whether the inquiry was accompanied by any threats, promises, or other coercive conduct.[5] In the instant case Peckler knew from other scources that the possibility of a strike existed at that time.[6] Insofar as this record discloses Profsky was the only porter on that shift and Peckler, who was then acting as his supervisor, had an interest in knowing whether the porter work would be performed. Finally there is no evidence that the inquiry, if made, was accompanied by any coercive statements. Based on all the above I find that the inquiry, if made, fell within the type of interrogation the Board has held to be permissible and not violative of the Act.[7] Accordingly, I find that this allegation is not sustained.

D. *The Klein, Layton, Pizzo, October 14 Sign Incident*

The complaint alleges that Respondent reprimanded, in writing, employees William Layton and Ira Klein for engaging in union activities while failing to reprimand employee Donna Piazzo who expressed antiunion sentiments. Respondent admits that there was a disparity of treatment but claims that it was due to the fact that Klein and Layton were not working when they were scheduled to work while Pizzo had returned to her work station.

Ira Klein had been employed, as a material handler, between May and November 1980. Klein's testimony on direct examination and on cross-examination contains several important discrepancies which bear on his credibility. Klein, on direct examination, testified that on October 14, at the start of his lunch period which was at 12 noon, he prepared a "Vote Union" sign and placed it on a file cabinet prior to leaving for lunch.[8] He returned to the production floor at or about 12:15 p.m. to find the sign in a basket. He returned the sign to the cabinet. Klein did not know who had put the sign in the basket but a few minutes after he replaced it Pizzo, returning from lunch with other employees, observed the sign and removed it from the cabinet and threw it into a basket. Klein once again removed it from the basket and returned it to the cabinet, whereupon Pizzo and Klein engaged in a "little scuffle," during which Pizzo made derogatory remarks to Klein.[9] At this point Iris Gonzalez, a leadperson, entered the area and Pizzo spoke to her. Gonzalez then took the sign, left the building, and returned with Tony Rizzi. Klein claimed that before Rizzi arrived he had started work. When Rizzi arrived he took Klein and Pizzo into a nearby maintenance closet where he reprimanded only Klein for what had occurred.[10] Klein claims that Rizzi said that Klein could not talk about the Union on company time and property, that if he wanted to discuss the Union, he should do so out on Old Country Road.[11] On direct-examination Klein claimed that the "scuffle" about the sign had been finished by 12:30 p.m., the end of the lunch period and that Rizzi had completed his talk to them in the closet within a few minutes thereafter. On cross-examination Klein testified that he and Pizzo had arguments prior to October 14 about matters unrelated to the Union. It appears that he was aware of Pizzo's attitude about the Union at the

[4] *Merle Lindsey Chevrolet, Inc.*, 231 NLRB 478, 482, 483 (1977); *B.N. Beard Company*, 248 NLRB 198, 208 (1980).

[5] *Mosher Steel Company*, 220 NLRB 336 (1975); *Industrial Towel & Uniform Service Company*, 172 NLRB 2254 (1968).

[6] As will be noted below Peckler knew from employees that Laura Bitterfield, another employee, was soliciting employee telephone numbers to apprise them about the strike.

[7] *Marco Polo Resort Motel*, 242 NLRB 1288, 1289 (1979).

[8] Klein's lunch period was from 12 noon to 12:30 p.m.

[9] It is not clear if the "scuffle" was a matter of words or actual physical contact.

[10] Apparently Gonzalez had given Rizzi some details.

[11] This is a public highway near Respondent's facility.

time he placed the sign in her general work area.[12] Klein also admitted, for the first time, on cross-examination that his friend, Billy Layton, had been involved in the incident. It appears that at some point prior to the appearance of Gonzalez, Layton also had retrieved the sign and put it in his work area. Klein claimed that this part of the incident occurred during Layton's lunch period, which if correct would mean Klein was not on his lunch period at the time because both testified that they had different lunch periods on that day.[13] According to Klein's direct testimony, the whole incident, including the reprimand by Rizzi, was over shortly after 12:30 p.m., however the affidavit given to the Board agent by Klein places the time as 1:45 p.m.[14] Finally, Klein also admitted on cross-examination that Rizzi had in fact reprimanded both Klein and Pizzo and threatened both with disciplinary action.

William Layton, employed in various job classifications from April 1980 to January 1981, differed with Klein on some aspects of the incident. He claimed that he heard Pizzo and Klein arguing at the start of his lunch period at 12:30 p.m. He then observed the sign on a table, took it, and put it up in his own work area. On direct examination Layton testified that at or about this time he saw Gonzalez make a telephone call and thereafter Rizzi arrived on the scene. When Rizzi arrived he took Pizzo, Klein, and Gonzalez into the nearby maintenance closet. Layton also claimed that, at some point after the four left the maintenance closet, Pizzo observed the sign in his work area and started to argue with him about it. At that time, according to Layton, Pizzo was not on her lunch period.

Rizzi testified that he was called by Gonzalez to building 98 at or about 1:30 p.m.[15] As he entered he heard shouting and observed that Klein and Pizzo were standing near Pizzo's machine and were engaged in a heated argument. Pizzo was banging on her machine and he cautioned her to stop because she could break it. Rizzi noted that as a result of the argument other employees had stopped working. He directed the other employees to begin work and he took Gonzalez, Pizzo, and Klein into a nearby closet. Rizzi claims that the two were redfaced and still arguing with each other. While in the closet Pizzo said to Rizzi that Klein had tried to persuade her to join the Union. Rizzi testified that he directed his remarks to both and told both that he did not care who was for or against the Union, there would be no further disturbances or he would take disciplinary action against both employees.

According to Rizzi, subsequent to the above-described events, he reported the matter to Mike Trentacosti, explaining that both Pizzo and Klein were arguing and that he had spoken to both about the disturbances they were creating on the production floor.[16] He also told Trentacosti that he had to speak to Pizzo about banging her machine because he was concerned that she would break it. Further, he relayed to Trentacosti that Layton was involved in the "same thing." Trentacosti at one point in his testimony stated that Rizzi had told him that Pizzo was not involved as she was at her work station. However at another point he testified that Rizzi had reported to him that, "the people stopped working because Donna was fighting with Ira." Trentacosti claimed that at some point he was told that the argument began while Pizzo and Klein were on their lunch period but that it continued after Pizzo had returned to work. Subsequent to Rizzi's report to him Trentacosti asked to see both Klein and Layton. He did not ask to see Pizzo allegedly because she had returned to work at the end of her lunch period. The meeting was brief, Trentacosti told Klein and Layton that he would not permit such disturbances, they could not deface company property and could not talk to people while they were working. They were told they would receive a written reprimand and there is some dispute as to whether they asked if Pizzo were also receiving such a reprimand and as to what was Trentacosti's reply. In any event Trentacosti directed Rizzi to prepare written reprimands for Klein and Layton, which Rizzi did and which Rizzi signed as a witness. On October 16, 1980, Rizzi called Klein and Layton to a conference room and read the written reprimands to them and asked whether they had any comments. Klein and Layton claim that they did not take the opportunity to register any protest because they believed it would be a futile gesture.

There were several discrepancies in the testimony of Klein and Layton, as noted, both between their own direct examination and their cross-examination and their separate version of the events of October 14. This lack of credibility will bear on the resolution of several other incidents to be discussed hereinafter. Insofar as this incident is concerned I do not credit Klein's testimony that Rizzi told him he could not campaign on company property. However, with respect to other aspects of the incident the testimony of all witnesses establishes that Respondent disciplined the prounion employees while failing to discipline the employees who opposed the Union. The written reprimands given to Klein and Layton state that they were disciplined for harassing other employees by discussing their union sentiments with them during worktime.[17]

Respondent contends that Klein and Layton were disciplined for violating a valid no-solicitation rule. This issue of an alleged violation of Respondent's no-solicitation rule arises in connection with two other incidents, an October 16 incident involving an employee, Bitterfield, and an October 17 incident involving an employee, Mariotti. The complaint is not couched in terms of disparate application of this rule in connection with these

[12] It is uncertain whether Klein did this deliberately to annoy Pizzo.

[13] Both Klein and Layton testified that Layton's lunch period on that day was from 12:30 to 1 p.m.

[14] Klein, in response to questions concerning this discrepancy, stated that the Board agent made a mistake notwithstanding his admission that he read the statement, declared it to be the truth, and signed it.

[15] Pizzo did not testify. Gonzalez did not testify directly on this incident.

[16] Mike Trentacosti is a vice president of the Company.

[17] G.C. Exhs. 3 and 7. There was some discussion about the fact that the complaint alleges that Rizzi issued the warnings while Respondent took the position that the warnings were issued by Trentacosti. In view of the fact that only Rizzi's name appears on the documents the allegation is understandable. I do not consider this matter to be of significance. It is undisputed that the Respondent issued the warnings.

two incidents but it is clearly the underlying issue in both situations. The matter was fully litigated and therefore it will be considered.[18] Respondent briefed the issue in detail.[19]

E. *The Bitterfield-Peckler Incident*

The complaint alleges that a conversation between Irving Peckler and Laura Bitterfield constituted interrogation. Respondent denies the interrogation but admits that the employee was reprimanded for violating a valid no-solicitation rule.

Laurie Bitterfield had been employed from November 1978 to January 1979 and from January to November 1980, during the latter period as an assembler. Bitterfield testified that on October 16 she attended a union meeting where the possibility of strike action was discussed. Thereafter, while at work that evening, during her break period, she spoke to employees who were working and asked them for their telephone numbers in order to advise them concerning the strike. According to Bitterfield, Irving Peckler, her supervisor, approached her and asked what she was doing and she told him she was securing employee telephone numbers. Peckler then asked if she were going through with the strike but she did not respond. Although the bell rang for her to return to work, Peckler continued the conversation by telling her that a strike was a waste of time, the Company did not have to bargain and the employees would not strike. Later that evening Peckler stopped her as she returned from making a phone call and said to her that he could "rack my ass" for talking about the Union on company time. He also attempted in this conversation to convince her to forgo the strike by proving to her that the employees would lose money if they struck. Bitterfield testified that she frequently spoke to other employees while she was on her break period but the other employees were working.

Peckler, who had been terminated by Respondent in December and who testified under subpoena, had a different recollection of the conversation. He claimed that on the day in question he was approached by other employees who asked him whether there was going to be a strike.[20] When he responded that he did not know, they told him that Laura Bitterfield was asking for their telephone numbers so that she could inform them when the strike started. It was after this conversation that Peckler observed Bitterfield walking toward the cafeteria and he approached her and told her she was not permitted to conduct union business during company hours and/or time.[21] Bitterfield responded, "you can't rack my ass for something like that, I'm on break." Pecklar stated that he told her that, while she may have been on her breaktime, the employees to whom she was speaking were working. Peckler further testified that employees who work together do talk to each other while working, although people on their breaktime usually leave the work area and do not talk to those who are working. Peckler denied talking to Bitterfield about what the strike would cost the employees and denied also that he used the language attributed to him by Bitterfield either then or at any other occasion.[22]

Ann Coppola had been employed by Respondent about 2-1/2 years at the time of her testimony. She worked the night shift until December 1980 when the night shift was discontinued. She was recalled subsequently and was employed at the time of the hearing. Coppola could not recall the exact date but she did remember that one evening while she was working, and Bitterfield was on her break, Bitterfield asked for her telephone number so that she could inform her in the event a strike was called. Bitterfield had a yellow pad and pencil and she spoke to other employees who were working, although Coppola could not hear what Bitterfield said to the other employees. Coppola testified that employees while on their breaktime did at times speak to employees who were working. Coppola, who worked for Peckler, claims that she had never heard him use the type of language attributed to him by Bitterfield.

The complaint alleges that this conversation constituted interrogation. However, based on Bitterfield's testimony, the conversation appears to contain not only the alleged interrogation but a threat of reprisal for engaging in union activity. In addition, while also not alleged, the incident raises the issue of disparate application of the no-solicitation rule. With respect to Peckler's alleged interrogation and threat my observation of the three witnesses, Bitterfield, Peckler, and Coppola, leads me to the conclusion that the conversation did not occur as testified to by Bitterfield. Peckler, who was at best a reluctant witness for Respondent, and who had no interest in the outcome of these proceedings, denied the interrogation and threat.[23] Furthermore, Coppola, a disinterested witness, testified that Peckler did not use profane language and Bitterfield admitted that prior to this time she had never heard Peckler use this language. Moreover the threat was not included in the complaint, an indication that the Region did not credit Bitterfield's statement. Thus, I do not find that the alleged interrogation or threat occurred. Rather I credit that Peckler, as he testified, reprimanded Bitterfield for engaging in solicitation on worktime in violation of Respondent's rule. As noted this issue will be considered below.

F. *The Mariotti-Leicht Incident*

The complaint alleges that Richard Leicht, a supervisor, threatened Stefania Mariotti, an employee, with discharge because of her union activities and issued a reprimand in writing to her for these activities. Respondent denies the above but admits disciplining Mariotti because she solicited on behalf of the Union on working time.

Stefania Mariotti, employed since December 1975, performed various duties including silk screening, wave sol-

[18] *Photo-Sonics, Inc.; Instrumentation Markets Corporation; Photo Digitizing Systems, Inc.*, 254 NLRB 567, fn. 2 (1981).

[19] Resp. br., pp. 60–64.

[20] One of these employees was Anna Copolla.

[21] At one point Peckler used company hours and, at another, company time.

[22] Peckler, during cross-examination, admitted that he had not told the Board agent during the course of the investigation that Bitterfield had made the statement, "rack my ass" to him.

[23] There appeared to be at one point a possibility of seeking court enforcement of Peckler's subpoena.

dering, and electronics under the supervision of Richard Leicht. Mariotti's union sympathies were well known by October 17, 1980. On that day Leicht called her to a conference room and, in the course of a conversation during which only they were present, reprimanded her for soliciting for the Union. According to Mariotti, Leicht told her that he had received complaints from other employees accusing her of soliciting them to join the Union while they were together in the ladies room. Leicht told her she could do it on breaktime or lunchtime but she could not do it during worktime and he suggested that, if she were not satisfied with her job, she should seek employment elsewhere. Mariotti denied that she had engaged in such conduct, although on cross-examination she conceded that when she was questioned in the ladies' room, by an employee, she believed to be Santa Colon, about the Union she did ask this individual to sign a paper for the Union. The sequence of events that led to the reprimand, according to Respondent's representatives, were set into motion by complaints received from other employees. Tony Rizzi, Respondent's foreman, testified that Iris Gonzalez, a leadperson, informed him on or about October 17 that Santa Colon and Felicia Oquendo, two Spanish-speaking employees, approached her with complaints about Mariotti attempting to have them sign for the Union while they were in the ladies room. Rizzi thereafter told Mike Trentacosti, a vice president, about the complaints and Trentacosti immediately asked to see the employees. Due to the fact that the employees spoke primarily Spanish, Rizzi requested Bertha Irizarry, an employee who spoke both Spanish and English, to attend the meeting with Trentacosti. Rizzi was not present during the meeting that followed. According to Trentacosti and Irizarry, the two employees, Colon and Oquendo, claimed that Mariotti had asked them to sign for the Union while they were in the ladies room. There is some conflict as to whether this happened more than once. Trentacosti immediately apprised Leicht and told him to speak to Mariotti. Leicht claimed that when he spoke to Mariotti he read his comments from a document, which he had prepared before he came to the conference room and which he termed a verbal warning.[24] The document basically states that Mariotti was to confine her campaigning to break and lunch time and before and after work. It further states that continued abuse of working time would result in disciplinary action. Leicht conceded that, although he might prepare a written report of an incident prior to speaking to an employee it, was not his usual practice to prepare verbal warnings prior to speaking to employees.[25]

[24] G.C. Exh. 5.

[25] Although the document is referred to as verbal warning, it is actually a documentation of a verbal warning. The Respondent appears to have a three-step procedure concerning the issuance of warnings. The first involves merely speaking to the employee, without any notation being made. The second is called a documentation of a verbal warning and involves speaking to the employee and placing a note in the employee's file. This written notice is not shown to the employees. The third is the actual written reprimand which is shown to the employee for their comment and then placed in their file.

G. *Conclusions Re Kelin, Layton, Pizzo, Bitterfield, and Mariotti Incidents*

Klein and Layton received written warnings for the October 14 incident ostensibly because they discussed their union sentiments with other employees during working time and because they created a disturbance on the production floor. Bittersfield was reprimanded allegedly for talking about the Union to employees who were working while Mariotti received her warning allegedly for soliciting employees to join the Union while she was in the ladies room.

Respondent contends that it has a valid no-solicitation which was violated by the above-noted employees and it was the violation of this rule, rather than their union activities, which brought about their discipline.

The parties stipulated that Respondent's handbook contains the following statement: "The solicitation of any kind is prohibited on working time."

This record fails to disclose when the rule came into existence or the reason for the rule. However, assuming that the rule had a lawful origin and was not created solely in response to the Union's organizing campaign, certain other factors must be examined; i.e., was the rule a valid rule, was it made known to the employees, and was it enforced in a nondiscriminatory manner. The Board has sought consistently to balance the right of the employer to operate his business without interruption and the right of the employees to engage in concerted activity.[26] In accomplishing this objective the Board has attempted to define the differences between rules which prohibit solicitation on "working time," "working hours," and/or "company time" and has held that those that prohibited solicitation on working time were presumptively valid and those that prohibited solicitation on "work hours" or "company time" were presumptively invalid.[27] However, such minor differences created problems and this began to be realized. In *Magnesium Casting Company, Inc.*, 250 NLRB 692, 709 (1980), the Administrative Law Judge found and the Board adapted the viewpoint that it was incumbent upon employers to see that their no-solicitation rule was stated in such a manner that employees could not fail to understand that all solicitation on company premises was not forbidden. The employee should not be in a quandry as to the meaning of the rule. And in a more recent case, *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB 442, 443 (1981), the Board discarded the distinction it set forth in *Essex International* between "working time" and "working hours." Thus the Board stated:

> We, however, see no inherent meaningful distinction between the terms "working hours" and "working time" when used in no-solicitation rules. Both terms are, without more, ambiguous, and the risk of such ambiguity must be borne by the promulgator of the rule. Either term is reasonably sus-

[26] *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962).

[27] *Uniflite, Inc.*, 233 NLRB 1108, 1109, 1110 (1977); *The Times Publishing Company*, 231 NLRB 207, 210 (1977); *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150 (1976); *Essex International, Inc.*, 211 NLRB 749, 750 (1974).

> ceptible to an interpretation by employees that they are prohibited from engaging in protected activity during periods of the workday when they are properly not engaged in performing their work tasks (e.g., meal and break periods). As such, either term tends unlawfully to interfere with and restrict employees in the exercise of their Section 7 organizational rights.

In the instant case the no-solicitation rule clearly is ambiguous and this ambiguity could lead employees to refrain from engaging in activity which is protected. In these circumstances the rule would be invalid. However, the Board in *T.R.W. Bearing Division*, did not find a violaton because Respondent in that case had not been put on notice that the presumptive lawfulness of those prohibitions was to be challenged or otherwise litigated. Respondent herein of course will argue that this is also true insofar as this case is concerned and that therefore a violation cannot be found based on its enforcement of this rule. I do not agree. Even assuming that the rule could be held to be a valid rule, under the holding of the earlier *Essex International* case, Respondent cannot rely on it for disciplining its employees. It remains the responsibility of Respondent to establish that the existence of this rule was known to its employees.[28] This record fails to disclose that the employees in fact received the Company handbook or were made aware of the rule prior to the events in issue. In fact the only evidence in this record tends to establish that the employees were unaware of the rule. Iris Gonzalez, an employee for several years and a lead employee, testified that when she circulated an antiunion petition she was unaware that she was doing wrong.[29] Thus she testified:

> He say he don't care what I do in my break time, don't let this happen again. I say okay. I don't know that's illegal.

Although I do not find, on the basis of this record, that the rule was properly promulgated, I nevertheless have considered the further issue of whether it was applied in a discriminatory manner with reference to the events that form the basis of the complaint.

An examination of the facts of the October 14 incident demonstrates that the alleged rule was applied in one fashion to the prounion employees and in another fashion to the antiunion employees. There can be no question from the testimony given by Rizzi, the representative of management directly involved in the incident, that he viewed Klein and Pizzo as equally responsible for the fracas.[30] In fact it was obvious from his testimony that he was more disturbed by Pizzo's attack on her machine than he was by Klein's conduct. With respect to the alleged reason for not disciplining Pizzo, i.e., that she was working, Rizzi's testimony does not support that assertion. She was in the "thick of the argument" although she may have been sitting at her machine.[31] The further proof that Rizzi viewed both Klein and Pizzo as equally responsible for the disruption can be found in the fact that he warned both verbally that he would tolerate no further disturbances. And whatever was Layton's participation in the events it apparently was of minor concern to Rizzi because he did not speak to Layton at all at the time of the actual incident. Furthermore Respondent's explanation that it was not Rizzi but Trentacosti who was responsible for the decision to issue warnings only to Klein and Layton warrants little consideration. The only report Trentacosti had on the incident came from Rizzi who told Trentacosti that both employees were arguing and causing a disturbance. Trentacosti does not deny that he was told that Pizzo was fighting with Klein and that Klein put up a prounion sign and Pizzo took it down. In these circumstances where the two employees contributed equally to the disturbance I do not consider the fact that one did it while sitting at a machine and the other, who has no definite work area, did it while standing to be of much significance. It is clear that both Pizzo and Klein were engaged in vehemently stating their position about the Union and were not working. In addition both were equally responsible for the fact that other employees were not working. It is not my position that an Employer must permit a violation of a no-solicitation rule or must tolerate a disruption of its production process merely because the matter involves the Union. However what an Employer may not do is to treat its prounion and antiunion employees in a different fashion, allowing one to do with impunity what it will not permit the other to do.[32] Respondent argues that it did reprimand Pizzo. However, a verbal reprimand certainly cannot be equated with a written warning which becomes part of an employee's personnel file. The evidence of disparate treatment is made crystal clear when one compares Respondent's actions with respect to Pizzo and Layton. The only evidence concerning Layton is that he put the sign in his work area, possibly on his worktime. There is no evidence that he created a disturbance. However, he also received a written warning while Pizzo who, according to Rizzi, was a party to the disturbance that caused a work stoppage and who continued to argue even after Rizzi cautioned her to stop, received only a verbal reprimand. Based on the above I find that the no-solicitation rule, even if considered valid prior to *T.R.W. Bearing Division* was applied in a discriminatory fashion and, accordingly, I find that the Respondent in issuing written reprimands to Klein and Layton and failing to issue such a warning to Pizzo violated Section 8(a)(1) and (3) of the Act.

My findings with respect to the validity of the no-solicitation rule and the lack of promulgation are applicable insofar as the rule concerns the Bitterfield and Mariotti incidents. In addition having found that the rule was applied in a discriminatory fashion I find that any reprimands issued to Bitterfield and Mariotti because of an al-

[28] *Montgomery Ward & Co., Incorporated*, 224 NLRB 104, 108 (1976).

[29] This incident will be discussed below.

[30] Although the reprimands issued to Klein and Layton allege that both Klein and Layton were talking about the Union to employees who were working the evidence of all witnesses establishes that Klein only spoke to Pizzo. It fails to establish that Layton spoke to any one, although both Klein and Layton admit putting up the prounion sign.

[31] Klein and Layton did not have similar definite work stations.

[32] *Blue Bird Body Company*, 251 NLRB 1481 (1980); *Capitol Records, Inc.*, 232 NLRB 228, 238 (1977).

leged violation of this rule similarly violate Section 8(a)(1) of the Act with respect to Bitterfield and Section 8(a)(1) and (3) of the Act with respect to Mariotti. It should be noted in connection with the Bitterfield incident that the credited testimony establishes that all employees had in the past been permitted to talk during worktime without interference by Respondent and it should also be noted that there is no claim that her conversation concerning telephone numbers caused a disruption in production. With respect to the Mariotti incident this took place in the ladies room where both employees had been permitted to go, neither was actually on worktime and there was no evidence that there was an interference with production.

H. *The Alleged Surveillance*

The complaint alleges that Respondent, by Pinkerton guards, kept the meeting places and activities of its employees under surveillance. Respondent denies this allegation.

It is undisputed that there were strike rumors in and about mid-October and that in fact a strike was set tentatively for October 20. According to Mike Trentacosti, because of concern about the strike, Respondent engaged the services of Pinkerton guards to patrol Respondent's premises. David Sapenoff, the Union's representative, agrees that the guards came to the premises on or about October 20.

The alleged surveillance took place at the premises of Respondent, more particularly at or near the entrance to the rear parking lot. Sapenoff testified that prior to October 20 it was his practice to speak to employees at or near this same entrance and that he had done so without interference by Respondent. However when he came to that area on October 20 to advise the employees that there would not be a strike he observed two Pinkerton guards walk from the front of Respondent's premises to the back where he was standing talking to the employees. The guards stood several feet away from him but did not speak to him. On the following day, as he drove down Tec Street, the street leading to the plant, the guards stopped him and told him that it was private property. Sapenoff continued driving, however, and told the guards that he intended to speak to the employees and they could call the police if they thought it was private property. The guards did not respond and Sapenoff went to the back parking lot where he spoke to Lyle Dodge and Stefania Mariotti. According to Sapenoff, Dodge, and Mariotti the guards continued to observe them while they talked, standing 4 or 5 feet away. Sapenoff claimed that the guards acted in a similar fashion for the next several days when he spoke to employees. There is no evidence that the guards took photographs, made notes, or engaged in any other conduct. The guards remained patroling the premises until early November when they left, apparently because a strike did not occur.

The Board has stated that when a union decides to campaign at the premises of a company it cannot complain if its activities are observed by company representatives.[33] In this situation the Union made the decision to speak to employees at the premises of Respondent. It is admitted that the guards were engaged only when there was a strike threat and they left when it became evident that the strike would not take place. There is no evidence that the guards were there for any purpose other than security of Respondent's premise. In these circumstances I do not find that the guards were there for the purpose of observing the union activities of the employees and therefore I do not find a violation of the Act.

I. *The Petition*

1. Contentions

The complaint alleges that Respondent, by Iris Gonzalez, circulated a petition among the the employees, which petition disavowed support for the Union. Gonzalez was not alleged to be a supervisor but was characterized in the complaint as a leadperson and agent of Respondent. Notwithstanding the fact that Gonzalez was not alleged to be a supervisor many of the questions posed by the General Counsel appeared to be directed toward establishing this status. Counsel for Respondent stated that it appeared to him that the General Counsel's position was that Gonzalez by virtue of her duties and authority was a "*pro forma*" agent of Respondent. The one contention advanced by the General Counsel concerning the status of Gonzalez which was clear was that certain conduct of Tony Rizzi, an admitted supervisor, made Gonzalez an agent.

In addition to the above contentions, the General Counsel appeared to argue that, if Gonzalez were not actually designated as Respondent's agent, certain conduct by Respondent's representative demonstrated to the employees that she reflected company policy when she solicited them to sign the petition.

2. The alleged origins of the petition

Bertha Irizarry, an employee, testified that sometime in October Respondent's president, Arthur Minsay, held a meeting during the course of which he discussed the decision of the Administrative Law Judge which had issued on September 18. According to Irizarry, Minsay talked generally about how the decision had overruled the employees' vote against the Union and about his plan to appeal the issue in the Federal courts. Irizarry stated that she was against the Union and after the meeting she discussed the situation with Felicia Solivan, another employee, and with Iris Gonzalez.[34] The three then decided that they would file a petition with the Board to seek its assistance in their efforts to prevent the Union from representing them. It was also agreed that Gonzalez would circulate the petition when it was completed and

[33] *Chemtronics, Inc.*, 236 NLRB 178 (1978); *Lippincott Industries, Inc.*, 251 NLRB 262 (1980).

[34] Tony Rizzi testified that after Minsay's speech he was approached by Irizarry and Gonzalez and they asked him if it would be legal for them to get a petition "that the girls didn't want the Union." Rizzi claims that he told them that he did not know if it would be legal but he had to remain neutral.

that she would solicit employee signatures because her job permitted her to move about the plant while the others were required to remain at their machines. It was the testimony of Gonzalez that she was assisted only by Irizarry in composing the actual language contained in the letter. On the other hand it was Irizarry's testimony that she, Irizarry, was assisted only by Felicia Solivan in drafting the letter and that it was drafted at Solivan's home with the aid of a dictionary.[35] When questioned as to the spelling and/or meaning of many words in the petition Irizarry could not respond. Irizarry claimed that the day after the document was drafted she gave it to Gonzalez to have it typed.[36] Gonzalez initially could not identify by name the person who did the typing for her other than to state that her office was in the area where management representatives, including the president of the Company, had their offices. It was established subsequently that the person who did the typing was Arlene Evler, a purchasing agent for the Company.[37] There is no dispute that Gonzalez thereafter circulated the petition during worktime and breaktime and secured several employee signatures.[38] Management allegedly first became aware of Gonzalez' conduct when Richard Leicht saw her in his area with a paper talking to an employee, Mariotti, who was under his supervision. Although Leicht did not claim to know what Gonzalez was talking about, he testified that he told Rizzi that Gonzalez was walking around with a paper trying to get signatures and she should not be permitted to do it, "whether it be for or against or whatever on work time—any kind of work time."[39] Rizzi called Gonzalez to his office to reprimand her. According to both Rizzi and Gonzalez, Gonzalez did not tell Rizzi what she was doing nor did she give him the petition. Notwithstanding this the documentation of the verbal warning prepared by Rizzi about the incident states that he, Rizzi, told Gonzalez that she could not campaign either for or against the Union during working hours.[40] Rizzi claims that he thought it was Leicht who told him that what Gonzalez was doing involved union matters but this is not supported by Leicht's testimony.

The above version of the birth of this petition is disputed by William Layton, witness for the General Counsel. According to Layton's direct testimony, on October 21, he was in building 100 where Tony Rizzi's office was located.[41] Layton claimed that on that day he had gone to the storage room which was directly behind Rizzi's office to secure material to clean the machines and while there he saw Rizzi hand a piece of paper to Gonzalez. Layton testified that he could not see what was on the paper but it "looked like" General Counsel's Exhibit 2 without the signatures. Rizzi then, according to Layton, directed Gonzalez to secure employee signatures.

Layton's presence in building 100 on October 21 is crucial to his story and therefore it is interesting to note the changes in his testimony on this point. Layton on cross-examination initially claimed that on October 21 he had transferred and was working in building 100.[42] However, at another point in his testimony, he claimed he did not go to building 100 until some days after Brian Roberts had returned to work which was on October 20. Layton, apparently realizing this conflict, then stated that, although he did not come to building 100 on a permanent basis until sometime after October 24, he was assigned there for 1 day, October 21, to learn the machines in that building. It is also interesting to note Layton's version of what happened before he observed Rizzi handing "the document" to Gonzalez. Layton claims that he entered the storage room behind Rizzi's office for a business reason, to pick up Brillo pads and napkins for the machine operators. This legitimate task could not have taken more than a few seconds even accepting his claim that he forgot to secure one of the items he had come for and therefore had to return to get it. According to Layton's version, however, he remained in that back room throughout a series of events which included the arrivals of Rizzi, Gonzalez, Leicht, and West, their exchange of greetings, two separate phone calls, and the separate departures of Leicht and West.[43]

Initially Layton testified that the door between the two rooms was open and he could see into the room. On cross-examination he testified that the door was held open by a wheel chair. Subsequently he changed this testimony to state that it was not the wheel chair but a wedge that held the door open.[44] According to Layton's direct testimony Rizzi could not see him at the door although the door was open and Rizzi was facing it because he, Layton, was standing behind a file cabinet on which a number of books were piled. When it was demonstrated to him that a file cabinet with several books atop it would be taller than he was and therefore it would be impossible for him to observe what was happening, Layton testified that there was a space between the wall and the books which permitted him to see into the room. Finally in this strange recital Layton admitted on cross-examination that he could not see the paper Rizzi allegedly handed to Gonzalez but he knew that it was General Counsel's Exhibit 2. He also testified that he could not hear the alleged conversation between Rizzi and Gonzalez except Rizzi's instructions to Gonzalez to secure signatures.

3. The status of Iris Gonzalez

As noted the General Counsel, although not alleging Gonzalez to be a supervisor, nevertheless did attempt to

[35] Solivan did not testify.

[36] Apparently the three employees either could not type or did not have a typewriter.

[37] Evler, on the basis of this record, is not a supervisory or managerial employee. Although she has the authority to pledge company credit, the only evidence in the record establishes that she does this based on judgments made by supervisors or officers of the Respondent.

[38] One of the employees who signed was Tony Rizzi's mother. The petition was mailed by Gonzalez in an envelope prepared by Irizarry. It was received in Region 29 on October 24.

[39] Gonzalez was under Rizzi's supervision.

[40] Resp. Exh. 11—Gonzalez was not aware that she had received such a warning, although she knew Rizzi had reprimanded her.

[41] There are two buildings wherein the incidents alleged in the complaint occurred, building 98 and building 100. Rizzi's office was in building 100 at the time of this incident.

[42] Layton prior to sometime in October was working in building 98.

[43] West is also a supervisor.

[44] Rizzi and Leicht testified that the door had a spring and normally was closed.

introduce evidence with respect to her alleged supervisory status. The evidence sought to be introduced related to the permission she allegedly gave to employees to leave work early, her alleged effective recommendation that applicants be hired, and her alleged recommendation respecting the evaluation and transfer of employees.

There is no contention that Gonzalez possessed the authority to hire, fire, promote, transfer, suspend, layoff, or recall employees, grant wage increases, or issue warning notices based solely on her own determination. Therefore, her status must be determined by other factors.

Gonzalez, who was employed at all times relevant herein as a leadperson on the day shift in building 98, testified that there were 40 people employed on that shift and that she was the only leadperson. She further testified that it was her responsibility to check the work of other employees and to monitor production. As she stated, "I be sure everybody, you know, do their work and also I be sure that everybody do production, you know, give me the production she had to give me in the machine." And further, "you know somebody don't do their work, I let know." The record discloses that Tony Rizzi had overall responsibility of the production in building 98 but it also establishes that his office was located in building 100 and that therefore he did not spend all of his time in building 98. The record does not disclose what percentage of time Rizzi spent in either building but it does appear that, when he was absent from building 98, Gonzalez was the only person in that building who was responsible to keep production moving and to correct the employees' work. However, although Gonzalez did direct the work of other employees, based on the testimony of all witnesses in this record, it appears that the direction was of a routine nature.[45] This type of routine direction standing alone is insufficient to support a finding of supervisory status.[46] It is difficult to ascertain from this record whether Gonzalez exercised independent judgment in determining assignments of work or correction of work. The record does, however, establish that Gonzalez voted in the election, punched a timeclock, and basically had the same benefits as the other employees.[47] Gonzalez did not have an office and she used the same desk during her break period as did the other employees. It further appears that when she was not checking the production of other employees she did actual production work and performed the production work of other employees in their absence. On the other hand it is clear that she was used as a conduit for management to relay information to employees and she did criticize the work performance of other employees to Rizzi. She contends and this record supports her contention that she reported infractions of rules or poor work performance to Rizzi who thereafter checked and made the decision on the matter.[48]

With respect to the other evidence introduced by the General Counsel on her status the record reveals the following. Ira Klein testified on direct examination that he personally received permission on two occasions from Gonzalez to leave work early and on another occassion he overheard another employee also receiving permission from Gonzalez to leave work early. However, on cross-examination Klein admitted that the issue of leaving work early occurred only once with respect to himself, and on that one occasion he told Gonzalez that he was leaving work because he was not well, he did not seek permission. Insofar as the granting of permission by Gonzalez to another employee was concerned, Klein during cross-examination admitted that he did not know all the details. Assuming, *arguendo*, that Gonzalez did on one occasion give permission to Klein to leave work early based soley on her own decision, such a sporadic exercise of supervisory authority cannot be considered sufficient to warrant a finding of supervisory status.[49] The allegation concerning her "recommendation" for hire invoked an employee, Bertha Irizarry. Irizarry and Gonzalez were friends of longstanding and, when an opening occurred, Gonzalez admittedly referred Irizarry to Rizzi for a job, but it was Rizzi who made the decision to hire Irizarry. It also appears that other employees made similar "recommendations" but in all cases the decision to hire was made by Rizzi. Similarly, with respect to the alleged transfer of employees by Gonzalez and her alleged effective recommendation of discharge for probationary employees, the record establishes that all such actions were examined by Rizzi and after his own investigation he made the final decision. This is not the type of independent action required to establish supervisory status.[50] Accordingly, I do not find that Gonzalez was a supervisor within the meaning of the Act.

The fact that I do not find Gonzalez to be a supervisor, however, does not resolve the matter. The Board has long held that a conclusion that an individual is not a supervisor is not dispositive of the question of whether that individual is acting as an agent of an employer.[51] Agency can be established by the mutual consent of the parties that the agent act for the principal.[52] Agency also can be established from the conduct of the principal.[53]

The only evidence with respect to whether the parties had a mutual agreement that Gonzalez would act as Respondent's agent involves Layton's testimony as to what he observed in Rizzi's office. If credited then the General Counsel has established that Gonzalez acted for Respondent.

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[45] Ira Klein testified that basically all employees knew their jobs and that there was little direction necessary.

[46] *General Freight Lines, Inc.*, 250 NLRB 435, 449 (1980); *J. J. Newberry Co., A Wholly Owned Subsidiary of McCrory Corporation*, 249 NLRB 991 (1980).

[47] Her salary is somewhat more than other employees due to her position as a leadperson.

[48] Thus with respect to the October 14 incident all parties argue that she reported the matter to Rizzi who then checked it and verbally reprimanded the employees. This also happened with the incident involving Mariotti. Gonzalez reported it to Rizzi and thereafter Trentacosti made an independent investigation and only then were warnings issued.

[49] *Judd Valve Co., Inc.*, 248 NLRB 112, 113 (1980).

[50] *American Diversified Foods, Inc., d/b/a Arby's*, 247 NLRB 1056 (1980).

[51] *Savoy Faucet Co. Inc., d/b/a Savoy Brass Manufacturing Company*, 241 NLRB 51 (1979).

[52] *International Longshoremen's and Warehousemen's Union, CIO, Local 6 et al. (Sunset Line and Twine Company*, 79 NLRB 1487, 1507 (1974); *Johnston-Tombigbee Furniture Company*, 243 NLRB 116 (1979).

[53] *A.C. Pfister Truck Service*, 236 NLRB 217, 220 (1978).

William Layton testified that he saw Rizzi give the petition to Gonzalez and instruct her to secure signatures. Layton, as I have noted, was less than a convincing witness with respect to other incidents. This lack of truthfulness continued with respect to this incident. As set forth above, Layton's testimony changed consistently, not only about his presence in the building but about what he observed and how he was able to observe it. Assuming, *arguendo*, that Layton did see Rizzi and Gonzalez together in Rizzi's office, it is obvious from his testimony that he could not see the document nor could he identify it. It also requires some stretch of the imagination to accept his statement that, although he could not hear the rest of the conversation, he was able to hear Rizzi's instructions to Gonzalez to secure signatures. In sum, I do not credit Layton's testimony and I find, accordingly, that the General Counsel has failed to establish that Rizzi gave the petition to Gonzalez and instructed her to secure signatures.

There remains the issue of whether, from Respondent's conduct, employees could believe reasonably that Gonzalez was acting on its behalf. Irizarry testified that she drafted the petition with an employee, Solivan. Gonzalez claims she helped Irizarry draft the document. I do not credit that either employee drafted this document, not only because of their conflicting testimony, but because the contents of the document establishes that neither employee could be the author. The language, style, spelling, etc., of the document is not reflective of their abilities. Although the actual author of the document remains unknown it is patently clear that it was not drafted by the Union or its adherents. What is also clear is that it was Gonzalez, management's conduit to the employees, who circulated the document. Consideration must be given therefore to whether Gonzalez in seeking to have employees disavow support for the Union was reflecting company policy and whether Respondent had placed her in the position where employees could reasonably believe she spoke for management.

This Respondent has opposed, with great determination, the organizing of its employees, as evidenced by the earlier decision. This firm opposition continued and was expressed openly to employees. Thus prior to the petition coming into existence Respondent's president, at a special meeting, announced his determination to employees to appeal Administrative Law Judge Schwarzbart's decision to the highest court and to continue the opposition to the Union. This speech, while not found violative of the Act, reaffirmed in the minds of the employees Respondent's antiunion attitude. Almost immediately thereafter the employees observed Gonzalez, management's spokesperson, openly walking around the plant during worktime soliciting employees to disavow their support for the Union. Although, as I have noted, Gonzalez was not a supervisor she had been placed in a position of authority by Respondent and employees could and did identify her as allied with management. She was the only person who checked their work in Rizzi's absence and she could and did report their infractions to Rizzi. Further, although Rizzi made the final decision to discipline, employees knew that Gonzalez was the one who instigated the investigation.[54] The Board has stated that an employee, although possessing no supervisory authority, nevertheless can be considered an agent if the employee relays information from management to employees and if he has been placed by management in such a position that employees could reasonably believe he speaks for management.[55] I find that these criteria exist in the instant case and I therefore find that Gonzalez was an agent of Respondent when she circulated the petition. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act.

J. *The Disciplinary Incidents—William Layton*

It is undisputed that beginning on October 3 Respondent issued a series of disciplinary warnings to Layton. Respondent contends that the warnings issued because of infractions by Layton of various rules and general dissatisfaction with his work. The General Counsel, on the other hand, contends that the Respondent was satisfied with Layton's work performance, as evidenced by his promotion on September 12, but this attitude changed when Respondent became aware of Layton's prounion sympathies and the disciplinary actions ensued because of this knowledge secured by Respondent.

Layton, on direct examination, testified that he had received compliments on his work performance at least once a month and recalled receiving these compliments from Trentacosti in May, Rizzi in June, and Gonzalez in September.[56] However, on cross-examination Layton contradicted this direct testimony and agreed with the testimony of Trentacosti and Rizzi, both of whom testified that they had criticized his work prior to September 12 and that Rizzi, in June, had threatened him with discharge if his work performance did not improve. There is no contention that at the time of these reprimands Layton was active on behalf of the Union. Thus it appears that from the outset Layton was less than a model employee. Although it is true that Layton was given the opportunity on September 12 to learn the duties of a mechanic's helper it appears that the "promotion" was granted in response to Layton's request that he be given the opportunity to learn the job.

Layton contended that sometime after September he attended two union meetings. He was certain the meetings did not take place in September but he could not place the exact date when they did occur and there is no evidence that they took place prior to either October 3 or 9. It does not appear that Layton participated in any way at these meetings other than by being present. Assuming, *arguendo*, that the meetings did occur prior to October 3, this record fails to disclose that Respondent had knowledge of Layton's attendance at these meetings

[54] Although Respondent allegedly did issue a warning to Gonzalez for her conduct, this warning was not given any publicity, even Gonzalez did not know it.

[55] *B-P Custom Building Products Inc.; and Thomas R. Peck Mfg.*, 251 NLRB (1980); *Han-Dee Pak, Inc.*, 249 NLRB 725, 729 (1980); *Solboro Knitting Mills Inc.*, 227 NLRB 738, 758, 759 (1977); *Broyhill Company*, 210 NLRB 288, 294 (1974).

[56] In the affidavit given during the course of the investigation, Layton claimed he received compliments for his work performance on a weekly basis.

at any time either prior to the issuance of the reprimands on October 3 and 9 or thereafter.

1. The October 3 incident

Layton, on direct examination, testified that he had a meeting with Rizzi in his office on October 3 wherein Rizzi reprimanded him for engaging in "horseplay" and for talking constantly to another employee, Fran Paliwaldi, when he should have been working. Although Layton claimed that during the meeting he denied the allegation, Rizzi advised him that a warning notice would be placed in his file.[57] Layton further testified that notwithstanding the warning Rizzi agreed to extend his trial period as a mechanic-trainee.[58] During cross-examination it was established that Layton had denied, in his affidavit submitted during the course of the investigation of the case, that such a conversation with Rizzi had occurred on October 3.

Rizzi testified that he had observed Layton and Ira Klein frequently engaging in "horseplay" and had observed Layton on several occasions talking to Paliwaldi rather than doing his work. On the day in question he heard yelling and laughing and saw Layton running around and this prompted the discussion. Rizzi stated that it was only after Layton's promise to "straighten out" that he agreed to extend his trial period as a mechanic-trainee.

Layton's failure to mention the October 3 incident in the affidavit given to the Board in the investigation is important on the issue of his credibility. With respect to his testimony about the October 3 incident it is noted that there are no major differences between Layton's direct testimony and that of Rizzi as to what occurred at the meeting. It is significant that this reprimand was given at a time when the evidence fails to establish that Respondent had any knowledge of Layton's alleged union activity. (This may explain why he failed to advise the Board of this incident in the investigation.) Layton also agreed that in this conversation he was offered an opportunity to extend his trial period. It is difficult to reconcile this offer with the alleged retaliation against Layton for his union activities. In sum I do not find that the warning which issued on October 3 was due to Layton's alleged union activities but find rather that it was issued because of Layton's failure to perform properly his work assignments.

2. The October 9 incident

Layton testified that on this day, while on the production floor, Iris Gonzalez accused him of giving her "the finger" and she told this to Tony Rizzi when he came into the building. Layton denied to Rizzi that he had made such a gesture to Gonzalez but claimed that he had done it to Sher Wali, a male employee. Rizzi told him he would not permit disrespect to any woman and he was given a warning.[59] The testimony of both Gonzalez and Rizzi establishes that Gonzalez did make this accusation against Layton.[60] Layton also concedes that this claim was made by Gonzalez to Rizzi in his presence. It is interesting to note that on cross-examination Layton once again admitted that the affidavit given to the Board in the investigation failed to mention this October 9 meeting with Rizzi. Again an inference is warranted that the failure to disclose this October 9 incident arose from Layton's realization that there was no knowledge of his union activities until October 14.

Insofar as this incident is concerned I do not find that Respondent, in issuing the October 9 warning, acted without justification. Nor do I find that the warning was issued because of Layton's alleged union activities. As noted, the evidence is insufficient to establish when Layton actually attended the two union meetings he claims to have attended but it is clear that Respondent had no knowledge of Layton's attendance at any meeting. Accordingly, I find that the warning of October 9 was issued because of Layton's conduct at work and was not due to his alleged prounion activity.

3. The October 29 incident

There is no dispute concerning the main facts of this incident. Layton had been told by a senior mechanic to clean the machines and he, to quote Layton, "flatly refused."[61] When questioned by Rizzi about what had happened, Layton not only admitted that he refused to do the work but told Rizzi also that he would not clean the machines because it was not his work, it was another employee's job. At this point Rizzi told him to leave and he would call him. Layton claimed that as he started to walk out Rizzi put his arm around his shoulder and pleaded with him to clean the machines because "they had company coming."

Rizzi agrees basically with Layton's version but denies that he put his arm around Layton's shoulder and pleaded with him to do the work. Rather Rizzi claims that he told Layton to do the work or "punch out." Both senior mechanics testified that the cleaning of machines comes within the responsibilities of a mechanic.

The General Counsel contends that the cleaning of machines was an assignment to more arduous work given to Layton because of his union activities and thus was violative of the Act. Additionally, he argues that the warning that followed also violates the Act. I do not agree. I credit the testimony of both Wali and Robins that this work was work normally performed by machines. There is no question that Layton refused a direct order, from both the senior mechanic and the plant manager, to do the work. It appears that Layton refused the task not because it was arduous work but rather because he was angered that this type of work, which he had done on overtime prior to October 28, had been given to

[57] G.C. Exh. 10.

[58] Layton had been made a mechanic-trainee on September 12.

[59] G.C. Exh. 11.

[60] Rizzi observed Gonzalez crying and questioned her as to the reason and it was then that she told him what had happened.

[61] The senior mechanic, Sher Wali, testified that he reported Layton's refusal to Rizzi. Layton had been assigned to assist Wali and to be trained by Wali after he complained that Brian Roberts was not training him properly. Wali told Rizzi not only about the refusal but about his general dissatisfaction with Layton because of his apparent lack of interest in learning the job of mechanic-trainee.

a more senior employee when overtime was reduced.[62] While Layton may have been angry about the loss of overtime, such anger does not justify a refusal to follow a supervisor's orders. I find that the assignment to clean the machines was not an assignment to more arduous work and further find that Layton had given Respondent grounds for disciplining him. Accordingly, I do not find that these allegations are not sustained.

4. The October 30 incident

On or about October 30 Layton was called to Mike Trentacosti's office. During the course of this meeting Trentacosti told him that he had been receiving complaints from Rizzi and others about Layton's refusal to do work and his insubordination. He was asked by Trentacosti whether he had any personal problems. Layton claims that he denied that he had problems but Trentacosti testified that Layton said that his father was ill. Trentacosti told Layton that if his attitude did not improve he would be terminated. A warning was issued to Layton.[63] There is no evidence from this interview that Layton was disciplined for any reason other than that stated by Respondent. Layton had given Respondent ample reason to discipline him. I find that the warning which issued on October 30 was issued because of Layton's work performance and not because of any union activities.

5. The November 7 incident

On November 7 Rizzi received a complaint about Layton from an employee, David Murray. As a result of this Rizzi held a meeting in his office during which Layton, Murray, and two supervisors, Leicht and West, were present.[64] During the meeting Murray, who was visibly upset, repeated his accusation that Layton was harassing him by telling him that Rizzi was going to fire him. Layton on direct examination admitted that Murray had in fact made the complaint although he testified that he, Layton, had only been attempting to teach Murray new duties.[65] Rizzi testified that Layton initially denied the allegation until confronted with Leicht's statement that he observed the incident at which point Layton claimed he was only "kidding" Murray. Layton received a warning notice for this incident.[66]

The warning notice which issued on this day was the direct result of acomplaint made by a fellow employee. The General Counsel does not contend and there is no evidence that Murray filed his complaint at the instigation of Respondent. It cannot be expected that an employer will forgo disciplining an employee, when an employee has engaged in serious misconduct, merely because the employer has knowledge that the employee in question has prounion sympathies. Accordingly I find that the warning was given because of Layton's misconduct, was not related to any activity he may have engaged in on behalf of the Union, and therefore was not violative of the Act.[67]

6. Layton's demotion—salary reduction

The complaint alleges that Layton was demoted on or about November 11, and his salary was reduced on or about December 15 because of his union activities. Layton, as noted, was promoted from a line feeder to mechanic-trainee on September 12. He continued in that position until either November 11 or 18 at which time he was demoted to a line feeder. According to Layton sometime in mid-November he was called to Rizzi's office. Layton did not recall who was present other than Rizzi.[68] During the interview he was told that Rizzi had received numerous complaints about him concerning his failure to complete his work properly, his carelessness, and general attitude. As a result Rizzi decided to demote him to line feeder and to reduce his salary. Layton testified that although he was shocked he did not say it. His main concern apparently was the pay reduction and not the demotion. Thus Layton testified, "I said it wasn't fair. I could see that you're dropping me, you know, from mechanic to line feeder but why do you have to drop my pay too. I was making $4 an hour and he dropped it to $3.70." Rizzi testified that Leicht was present and that he read the reasons why Layton was being demoted from a prepared doucment.[69] At or about this time Ira Klein had resigned, and a line feeder position was open. Rizzi transferred Dave Murray to the line feeder position in building 98 and kept Layton as a line feeder in building 100.

Although Layton had been told that his salary would be reduced, it appears that due to a clerical error this did not happen until early December. At that time there was a general increase and, when Layton complained that his salary did not reflect the increase, Respondent became aware that Layton's salary had not been reduced when he was demoted. Layton's salary was then reduced on or about December 15.

The demotion and the salary reduction were, the General Counsel contends, because of Layton's union activities. It is my understanding of the General Counsel's case that these events are connected. As I understand it, if the demotion was justified then the salary reduction also was justified. If the demotion was not, then the salary reduction was not justified.

Layton's union activities have been outlined above. An examination of Layton's work record during the approximately 2-month period between his promotion on September 12 and his demotion in mid-November discloses that it as an extremely poor one. As set forth above, Layton received five warnings, on October 3, 9, 29, 30, and November 7. I have set forth the reasons why I

[62] This incident of reduction in overtime will be discussed below.

[63] G.C. Exh. 9. This is a two-page document. Layton initially testified that he had received a two-page document and repeated that several additional times. However, subsequently he attempted to change this testimony and stated that he had received only a one-page document. I do not credit this subsequent testimony.

[64] West shared office space with Rizzi.

[65] It was general knowledge at the plant that Murray has some learning difficulties.

[66] G.C. Exh. 12.

[67] In the circumstances of this incident Layton's conduct was of a particularly reprehensible nature.

[68] On direct examination he thought Richard Leicht was present but was uncertain about this on cross-examination.

[69] Resp. Exh. 16.

found those warnings to be justified. The warning on October 29 was for insubordination, which alone would have been sufficient reason to discharge him. The Respondent, however, did not dlscharge Layton and Layton continued his total disregard for proper work performance. On October 30, Trentacosti, the Respondent's vice president, spoke to him warning him of discharge if he did not improve. This warning also went unheeded. On or about November 6 Layton again engaged in conduct warranting discharge. On that day he absented himself from work without notifying his employer.[70] On the following day he harassed an employee by telling him he would be fired. This type of harassment to an employee who, Layton knew, had some learning difficulties was serious misconduct. Contrary to the assertion to the General Counsel that the Respondent was seeking to get rid of Layton, the record establishes that the Respondent was lenient with him and sought to help him. Thus the Respondent extended his trial period on or about October 24 to provide him with the type of training he sought. Layton, however, did not avail himself of these opportunities but continued to engage in "childish" conduct not proper to the work place. Several witnesses testified about Layton's lack of attention to his work and my observation of Layton leads me to the conclusion that he was not concerned about his work. I find therefore that Respondent demoted Layton and reduced his salary because of his poor work record and not because he engaged in union activities. Accordingly, I do not find that these allegations of the complaint have been sustained.

7. The December 15 incident

The complaint alleges that Respondent, by Mike Trentacosti, prevented Layton from returning to work on time and thereafter issued a written reprimand to him for returning late to work. During the hearing the General Counsel amended the complaint to delete the section which stated that Layton had received a written warning for this incident. I am unclear in view of that fact as to why the entire paragraph was not withdrawn. However, in view of the fact it was not the matter that will be discussed.

On December 15 Layton promised a fellow employee to fill her car radiator with water. When it was the break period Layton took a coffeepot of water from the cafeteria and left the Respondent's premises through the rear door to perform the promised task. He left the rear door open apparently to reenter as he had exited. Trentacosti noticed the door and walked toward it but as he did so Layton appeared with the coffeepot. Trentacosti asked Layton what he was doing and Layton, according to his own testimony, did not respond. Although Trentacosti asked him a second time what he was doing Layton did not respond. Layton claims that Trentacosti pushed him and closed the door in his face. He then had to enter the front door which he did shortly before the break period ended. When he returned Leicht, another supervisor, criticized him for being late and told him he would get a warning for being late. Trentacosti denied that he pushed Layton and Leicht denied criticizing Layton or making any statement about Layton receiving a warning. As I have said several times, Layton is not a credible witness. Nor do I credit his testimony that Trentacosti pushed him or that Leicht warned him. Rather, based on his own testimony, I find that Layton left the Respondent's premises with a coffeepot belonging to Respondent and when questioned by Respondent's vice president about his actions refused to respond. This was, to say the least, insubordinate conduct for which Layton could have been discharged. In fact he was not disciplined. Accordingly, I find that Respondent did not engage in any conduct with respect to this incident which could be considered a violation of the Act.

K. *The Close Supervision Incident—William Layton*

The complaint alleges that on December 15 Layton was subjected to more arduous conditions of employment because of close supervision by Richard Leicht. Respondent denies this allegation.

Lyle Dodge testified on direct examination that on December 12 he observed Layton come from the area of the production office with a piece of paper in his hand. Leicht was standing at Layton's work station waiting for him. Dodge could not hear what was said but he heard raised voices and thought the two were arguing. Then he observed Layton standing 5 to 6 feet from Layton, with his arms folded. Leight remained in that position for about 15 minutes. On cross-examination Dodge, for the first time, mentioned that Leicht returned about 5 minutes later and stood staring at Layton for another 5 to 6 minutes. He initially testified that he had mentioned this second "supervision" during the investigation but subsequently admitted that the affidavit which he gave during the investigation did not reflect any such incident.

Layton initially testified that the supervision by Leicht occurred after the incident with Trentacosti on December 15 and that Leicht kept watching him the whole day. He did not mention any argument with Leicht such as the one described by Dodge. However, on cross-examination Layton claimed that the alleged supervision took place in a different context. According to this version someday in December Layton had a discussion in Leicht's office about production figures. After the discussion he returned to the floor and commenced work and sometime thereafter he noticed Leicht looking at him with his arms folded. When questioned as to where Leicht stood while observing him Layton said at the satelite machines. When he was reminded that Dodge had testified that Leicht stood at the end of a partition while observing him, Layton recalled that this occurred the second time that Leicht observed him on that day. He denied Dodge's claim that Leicht looked at him for only 15 minutes. The contradictions between Layton's testimony on direct examination and cross-examination and Layton's testimony and that of Dodge were numerous. Leicht denied that he observed only Layton. Rather he testified that it was his practice to stand on the floor, arms folded, to observe the flow of production of all em-

[70] Layton claimed that he told Rizzi he was at the Labor Board. Rizzi denied this and Layton's affidavit failed to reflect that he told Rizzi he was at the Board. I do not credit Layton.

ployees. Based on my observation of the witnesses, I do not credit that Leicht subjected Layton to close supervision because of his union activities. Assuming, *arguendo*, that Leicht did observe Layton to a greater degree than he did other employees, I find that such observation was caused by Layton's poor work performance, which is amply documented by the evidence in this record. Accordingly, I find that this allegation of the complaint is not sustained.

L. *The Alleged Disparate Treatment—William Layton*

During the course of the hearing the General Counsel moved to amend the complaint to include an allegation concerning a warning for poor work performance which was given to Layton on December 12. This motion was granted and the complaint was so amended. Respondent concedes that the warning was issued but contends it was issued because of Layton's poor work performance and was not based on any union considerations.

Richard Leicht assumed responsibility for the production in building 100 in December.[71] He became aware that the production figures he was receiving and the actual production being done were inconsistent. He spoke to all the employees involved about the discrepancy but he issued a warning only to Layton. The General Counsel contends that this was disparate treatment and it arose because of Layton's union activities. Respondent contends that there was no disparate treatment because the warning which issued to Layton was based on his poor performance, whereas the interview with all the employees, including Layton, concerns the manner in which the employees were keeping their production records and no employee received a warning for their failure to keep proper records. I do not read Leicht's testimony to establish such a fine distinction, particularly when viewed in the context of his direct testimony. However, I do not consider it necessary to determine if such a fine distinction existed. Assuming, as I have, that the comments about poor performance were made to all employees, I still would not find a violation. Leicht credibly testified that he considered Layton, who fed the line as the "strongest link in the chain" who could either make or break production. Therefore, when he observed that wafers were left at the cutting station and were not put through the line, he attributed this failure to Layton. In general Leicht formed the opinion that Layton's work performance was at best "lackadasical." It was this generally poor performance which prompted the warning to Layton, although admittedly other employees were also reprimanded for their performance. Based on my observation of the witnesses and the documented record of his shortcomings with respect to his work I credit Leicht's testimony that he considered Layton the employee most responsible for the production problems and I find that the warning was issued to Layton based on this consideration and not because of his union activities, which as I have noted were limited. Therefore I find that this allegation is not sustained.

[71] The bulk of production work was transferred by Rizzi to building 98 in early December and what production work remained came under the supervision of Leicht.

M. *The Alleged Loss of Overtime*

The compliant alleged that Layton and Klein received less overtime after October 15 than they had received prior thereto due to their union activities. Respondent contends that Klein consistently refused overtime prior to that date and that in any case all overtime was reduced due to economic considerations.

The parties stipulated to the receipt of General Counsel's Exhibit 4 and stipulated that it was accurate with respect to the hours of overtime worked by all employees. This document reflects that Klein worked 15 hours overtime from August 5 until his termination in mid-November. It appears that of these 15 hours, 8 hours were worked on September 30. Klein admitted on direct examination, although he subsequently changed his testimony, that he had refused offers for Saturday overtime work. As noted I have not credited Klein's testimony on other aspects of the case and I do not credit his testimony that he had been told by Rizzi that he could alternate Saturday overtime work with Layton and another employee, Angelo Cola. Rizzi denied that such an offer had been made.

The combined testimony of all witnesses establishes that on or about October 28 Tony Rizzi called employees Klein, Layton, Cola, Bocca, Robbins, and Wali to his office and advised all that there would be a reduction of all overtime work due to economic considerations. Thereafter in fact, Bocca, Klein, and Layton received no overtime while Angelo Colo, a 7-year employee, had his overtime reduced over 50 percent and Robbins and Wali, the two mechanics, also suffered substantial losses.[72] It is clear from this record that the Respondent experienced financial difficulties commencing in October which eventually caused a cancellation of the night shift and a consolidation of operations in December.

Based on this record, I do not find that it was the union activities of Klein and Layton that led to the loss of overtime work but find rather that it was financial considerations which caused the loss of overtime work or a diminution of overtime work for all employees. Further, I do not find any disparity of treatment because Respondent determined to give whatever overtime work was available to its long-term employee, Colo. Insofar as this record discloses Colo was an exemplary employee, while Layton was a less than model employee. In sum, I do not find that this allegation is sustained.

N. *The Alleged Change of Attitude Problem*

The complaint appears to allege that representative of management changed their attitude toward Layton and this made working conditions more arduous for him. An examination of this record fails to establish that any representative of management had a close relationship with Layton. It does show that from the outset the Respondent had problems with Layton's attitude toward work

[72] Colo, the long-time employee, who had worked 13.2 hours of overtime the week of October 28, and worked about that amount for several weeks prior thereto, worked 5.4 the week of November 4, none as of November 11, 6 the week of November 18. Wali, who had worked as many as 20 or more hours overtime a week, worked no overtime the 2 weeks after the meeting in Rizzi's office and very few hours thereafter.

and toward his supervisors. It further establishes that notwithstanding these difficulties the management representatives attempted to counsel Layton, extended his probationary period, changed him from one supervisor to another, all in an effort to make him a more acceptable employee. It further establishes that their effects were not successful and Layton continued his poor performance. Layton evidently considered these efforts by Respondent to improve him as "bugging him" but if so it was his attitude that was causing the problem. I do not find that this allegation is sustained.

O. *The Unilateral Changes*

The complaint alleges that the Respondent made certain unilateral changes in violation of Section 8(a)(5) of the Act. The parties are in agreement that the issue of whether these changes constitute a violation depends on the determination made by the Board in the case now pending before it. Therefore, in the event that the Board finds that Respondent does not have a duty to bargain, this allegation of the complaint will be dismissed. On the other hand, if the Board affirms the decision of Administrative Law Judge Schwarzbart the following changes, which the parties have stipulated to, will be deemed violations. The changes are as follows:

1. Respondent, in December 1980, reinstated the practice of employees having their birthdays as a paid holiday effective January 1, 1980.

2. Respondent, on December 3, 1980, granted its employees an across-the-board wage increase in varying amounts between 30 and 45 cents per hour.

3. Respondent, on December 10, 1980, laid off 12 employees and a supervisor comprising the night shift.[73]

CONCLUSIONS OF LAW

1. Respondent Knogo Corporation is an employer within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By circulating a petition, by its agent, Iris Gonzalez, among its employees disavowing support for the Union and soliciting them to sign it Respondent violated Section 8(a)(1) of the Act.

4. By giving disparate application to a rule prohibiting solicitation on its premises during actual worktime so as to impose limitations on the activities of employees who supported the Union, while permitting employees to engage in activities against the Union on its premises during actual worktime, Respondent violated Section 8(a)(1) of the Act.

5. By warning its employee, Laura Bitterfield, not to solicit employee support for the Union during actual worktime while permitting other employees to solicit support against the Union during actual worktime, Respondent violated Section 8(a)(1) of the Act.

6. By issuing warning notices to its employees Ira Klein, William Layton, and Stephanie Mariotti for engaging in solicitation and activities on behalf of the Union allegedly during actual worktime while tolerating actual worktime activities of employees opposed to the Union, Respondent violated Section 8(a)(3) of the Act.

7. By unilaterally changing wage rates, hours, paid holidays, and laying off and recalling employees, Respondent violated Section 8(a)(5) of the Act.[74]

8. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. The Respondent did not violate the Act with respect to the following incidents:

(a) The alleged interrogation of Lyle Dodge by Louis Famighetti on or about August 29, 1980.

(b) The alleged interrogation of Lyle Dodge by George Payne on or about October 15, 1980.

(c) The alleged interrogation of Richard Profsky by Irivng Peckler on or about mid-October 1980.

(d) The alleged interrogation of Laura Bitterfield by Irving Peckler on or about October 6, 1980.

(e) The alleged surveillance of employee meeting places and activities by Pinkerton guards.

(f) The warning notices issued to William Layton on October 3, 9, 29, and 30, November 7, and December 12, 1980.

(g) The alleged subjection of employees to more arduous conditions of employment.

(h) The alleged failure to provide overtime work to Ira Klein and William Layton because of their union activities.

(i) The demotion of William Layton on or about November 11 from a mechanic-trainee to a line feeder because of his union activities.

(j) The reduction in the salary of William Layton on or about December 15, 1980, because of his union activities.

(k) The alleged disparate treatment of William Layton on or about December 12, 1980, because of his union activities.

(l) The alleged refusal by Respondent's vice president to allow William Layton to return to work on or about December 12, 1980.

(m) The alleged closer supervision of William Layton by Richard Leicht.

THE REMEDY

In order to remedy the unfair labor practices found herein, I shall recommend that Respondent be required to cease and desist therefrom and take certain affirmative aciton in order to effectuate the policies of the Act, including the posting of an appropriate notice.

Having found that Respondent has enforced its no-solicitation rule to prohibit employees from engaging in activites on behalf of the Union during actual worktime while permitting employees who opposed the Union to do so, I shall order that Respondent cease and desist

[73] Apparently five of these laid-off employees, P. Hardison, D. Mahood, R. Mahood, A. Coppola, and C. Martinez were recalled at some point not disclosed by this record.

[74] In the event that the Board fails to find that Respondent had a bargaining obligation as set forth in the decision of the Administrative Law Judge in Cases 29-CA-6502, 29-CA-6522, 29-CA-7081, 29-CA-7207, and 29-CA-7360 then this will not be found to be a violation of Sec. 8(a)(5) of the Act.

from enforcing its no-solicitation rule in such a disparate manner.[75]

Having found that Respondent discriminated against Ira Klein, William Layton, and Stephania Mariotti, as described above, in violation of Section 8(a)(3) of the Act, I shall order Respondent to rescind the disciplinary notices issued to them on October 16 and 17, 1980, respectively, and to expunge from their personnel and other records all reference to said warnings and to notify Ira Klein, William Layton, and Stephanie Mariotti.

[Recommended Order omitted from publication.]

[75] As noted this rule as now stated would appear to be violative of *T.R.W. Bearings Division*, however, following the Board's decision in that case a violation will not be found in this proceeding with respect to the rule but only with respect to the discriminatory application of the rule.